

Marine Le Pen's Constitutional Programme on the European Union: Use, Misuse and Abuse of Referenda

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On February 2nd, the French newspaper *Le Monde* published an [interview with Marine Le Pen](#), leader of the most important far-right party the National Front and candidate for the presidential elections. There is a lot that can be said about this interview and notably about her refusal to reimburse nearly € 300,000 to the European Parliament for hiring “ghost” parliamentary assistants (not members of her family though, unlike what François Fillon, the conservative candidate, is currently accused of, but a close friend and a bodyguard) who actually worked for the Party – a decision she says she will challenge before the French *ombudsman*, the Defender of Rights, even though it has no jurisdiction over the decisions of the European Parliament.

As regards her constitutional programme, when asked what would be her first moves as a president (her first “100 days”), her answer can be summarised in one word: referenda. Plural. One of them would be, of course, about “Frexit”, the other would include a vast set of amendments to the French Constitution – just like Nicolas Sarkozy in 2008 – and would take place just after the legislative elections (which, themselves, take place after the presidential elections). Rather than focus on the whole content of these two referendums, which would be worthy of lengthy discussions, we would like to focus here on the EU aspects of this (rather sketchy) constitutional programme. Two things stand out. Firstly, Marine Le Pen wants to use the Constitution as a Declaration of War against the European Union (I). Secondly, Marine Le Pen's use of referenda, as regards the European Union, is in fact a manipulation of referenda, since voters will actually be called twice (maybe even three times) to vote, in substance, for “Frexit” (II).

Marine Le Pen's proposed constitutional referendum: A Declaration of War against the European Union

Given the timeline Marine Le Pen proposes in the interview, the constitutional referendum would take place before the Frexit referendum. However, three of the constitutional amendments she proposes are in direct contradiction with European Union Law, whilst they do not necessarily “empower” national authorities – as a matter of fact, some of these amendments could have the exact opposite effect.

First of all, Marine Le Pen wants to **repeal, in the French Constitution, the “Chapter” (in fact a Title) concerning the European Union (Title XV)**. It would make sense, legally speaking, to delete this Title *after* a potential “Frexit”, but this does not seem to be the proposed sequence of events. If the constitutional referendum is to be organised shortly after the legislative elections, and should this referendum be met positively by the voters, then this repeal would be likely to occur *before* France actually withdraws from the European Union.

The problem is that the constitutional provisions laid down in this Title (Article 88-1 et seq.) were added to the French Constitution in order to avoid contradictions between the French Constitution and several provisions of most of the European treaties since the Maastricht treaty. Repealing Title XV would revive these contradictions and therefore make the French Constitution incompatible with several aspects of EU Law, for example the qualified majority voting system in the Council and the right of Union citizens to vote and to be elected at local elections. It would also render the French measures adopted to implement the European Arrest Warrant unconstitutional. Furthermore, it would repeal the French Parliament's power to give an opinion on EU draft legislation, its right to challenge a piece of legislation before the European Court of Justice (through the Government) and its power to oppose a simplified amendment to the EU treaties. ironically, it would also diminish... the role of referendums (which Madame Le Pen seems otherwise to value so much) in EU enlargements! According to article 88-5, referendum is the default procedure for France to agree to an enlargement of the European Union.

Secondly, Marine Le Pen wants to make French Law superior to the European treaties and the secondary legislation. She is most probably referring to Article 55 of the French Constitution, according to which Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party. In 1975, in the famous *Jacques Vabre* ruling, the *Cour de cassation* (the French Supreme Court for civil and criminal matters) deduced from this provision that if, in a case brought before a court, certain provisions of an Act of Parliament appear to be incompatible with certain provisions of an international treaty, and if all the conditions set out in Article 55 are met, the court must then disregard the said provisions of the Act of Parliament. The *Conseil d'Etat* (the French Supreme Court for administrative matters) adopted the same position in 1989 with its *Nicolo* ruling.

Clearly, what Marine Le Pen wants is to re-establish the supremacy of the French Parliament over EU Law, but not over the rest of International law, since she only mentions the European treaties and secondary legislation. It speaks volumes about who the real enemy is here. However, in spite of being a lawyer herself, she seems to neglect a few things a second-year law student ought to know. Firstly, just because the Acts of Parliament would be above EU Law in the French legal hierarchy would not make France less liable for any possible breach of EU law, especially before the European Court of Justice. Secondly, just because Acts of Parliament are not “under” international treaties in the domestic legal hierarchy does not mean they are not judicially constrained by them. The case of dualist countries, like Germany, Italy or the United Kingdom, and also the case of France before 1975-1989, prove this. Even when the international treaties are not technically “superior” to Acts of Parliament, the national courts do their best to interpret Acts of Parliament in a way that is compatible with the international treaties. Only if there is an absolute – and possibly intentional – contradiction between an Act of Parliament and a treaty would a court agree to put the country in a situation where it would be in breach of one of its international commitments – with all the consequences that such a situation entails.

Thirdly, Marine Le Pen wants to constitutionalise the national priority. The “national priority” is nothing but a rebranding of the “national preference” – an old, recurrent anthem of the National Front that does not require much explanation. The legal consequences of such a concept in the French Constitution are very clear. It would allow protectionist measures and measures against foreign goods and individuals. We actually get a flavour of what “national priority” may entail in the rest of the interview. Marine Le Pen wants to create a tax on every new employment contract with a foreigner and a 3% “social contribution” on imported goods and services. Needless to say, these measures, if they were to be applied to EU citizens, goods and services, would be in clear violation of the EU principles of free movement of workers, goods and services. Even if they were only applied to non-EU workers, goods and services, the “social contribution” on goods looks a lot like a custom tax, which EU member states are prohibited from levying, including on non-EU goods, whereas the tax on foreign workers would quite possibly be incompatible with the principle of non-discrimination under the EU Charter of fundamental rights. Again, Marine Le Pen sees the French Constitution as a way to circumvent European principles.

These amendments would clearly contradict EU Law, even though they supposedly would be adopted when France would still be a member State. In fact, they only make sense as a way of burning the bridges, in order to make the path to “Frexit” irreversible.

Marine Le Pen’s Frexit strategy: a staged performance and referendum manipulation

In the same interview, it seems that Marine Le Pen would like to do what we would like to call a “reverse Cameron”.

Once elected, she would “go immediately” to Brussels to negotiate “the return of the four sovereignties: monetary, legislative, budgetary and territorial”. Within six months after her election, she would then organise a referendum on the withdrawal of France from the European Union. If by then she has got what she wants from “Brussels”, she would campaign for “Frexit”, otherwise she would campaign for “Frexit”. The three constitutional amendments she proposes would serve as a leverage in the negotiations, in the sense of „give me the right to do what I have already done, contrary to EU Law but with the support of French people“.

This sequence is all too familiar. Constitutional amendments excepted, this is exactly what David Cameron did,

with one big difference. Cameron never wanted the United Kingdom to leave the European Union. During the European Summit of February 2016, Cameron's negotiation of his "new settlement for the United Kingdom in the European Union" was excessively dramatized to make it appear as if David Cameron was negotiating strongly for the British people. However, at the end, despite some very small, mostly virtual and probably illegal concessions, Cameron campaigned for Breain, as, in all likelihood, he had always intended to.

Marine Le Pen seems to want to follow the same path, except for one thing (hence the idea of "reverse" Cameron), no one believes for a minute that Marine Le Pen would campaign for "Fremain" in any circumstances. This is why the four "sovereignities" she wants to claim back are in fact four red lines she knows France's European partners would never accept, *i.e.* the withdrawal of France from the euro zone, the reversal of the primacy of EU Law, the cancellation of EU rules and procedures on national deficits and the cancellation of the free movement of persons. The so-called "negotiations" she mentions would be but a pretext to blame Europe.

Madame Le Pen, however, claims otherwise. According to her, there is "a lot of changes in the European Union". She claims to believe that the elections to be held later this year everywhere in Europe (Netherlands, Belgium, possibly Italy...) will put the European Union in a "difficult position" and that, once she starts her negotiation, a lot of other member States will try to repeal "regulations and treaties that are harmful for their security and their economy". Again, the British precedent clearly shows otherwise. Granting Marine Le Pen's wishes about the European Union would require the unanimous consent of *all* the 27 other Member States. Needless to say, such an outcome is extremely unlikely. As a matter of fact, even those Member States with authoritarian tendencies and a manifest dislike for the European Union, like Hungary or Poland, have no interest in restoring French territorial sovereignty, as Marine Le Pen is requesting, since this would most likely affect their own citizens living or working in France. Furthermore, France's European partners may not wish to be presented with Marine Le Pen's constitutional *fait accompli*. The whole prospect of these negotiations is a farce.

The constitutional referendum appears to be an unofficial Frexit referendum before the official Frexit referendum. If the constitutional referendum succeeds, the phony negotiation with Brussels and the "Frexit" referendum would be mere formalities. The links with the European Union would be *de facto* severed after the first (constitutional) referendum, because of the major breaches to EU law it would entail. If the constitutional referendum fails and if Marine Le Pen then does not resign (as arguably she should), the "Frexit" referendum would serve as a "second shot". Last but not least, if the constitutional referendum succeeds but the Frexit referendum fails, the French Government would be left with two choices: either staying in the European Union with a Constitution that is openly incompatible with EU Law, or repealing the constitutional amendments incompatible with EU law. This second choice (legally speaking, the only possible one) would however require a *third* (!) EU-related referendum since one of the constitutional amendments proposed by Marine Le Pen is to make referendum mandatory for every constitutional amendment. In a nutshell, this is nothing short of a manipulation of referendums, consisting in making voters vote twice, maybe three times, for Frexit.

There is something quite ironic about all of this. Eurosceptics are always prone to criticise the European Union when voters in a national EU-related referendum are made to vote again when the result is negative – e.g. Ireland with the Lisbon Treaty. Eurosceptics themselves are far from being up to the democratic standards they keep lecturing about. Underneath the apparent enthusiasm for referendums and consulting the voice of the people, it is never difficult to see the National Front's true colours.

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SUGGESTED CITATION Platon, Sébastien: *Marine Le Pen's Constitutional Programme on the European Union: Use, Misuse and Abuse of Referenda*, *VerfBlog*, 2017/2/05, <http://verfassungsblog.de/marine-le-pens-constitutional-programme-on-the-european-union-use-misuse-and-abuse-of-referenda/>.